

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Chapter 11
. .
. Case No. 09-15378 (REG)
. .
SIGNATURE APPAREL GROUP, .
LLC, .
. .
Debtor. .

SIGNATURE APPAREL GROUP, . Adv. Case No. 11-02800 (REG)
LLC, .
. .
Plaintiff, .
. .
vs. .
. One Bowling Green
STUDIO IP HOLDINGS, et . New York, New York 10004
al., .
. .
Defendant. . Tuesday, November 4, 2014
. 2 p.m.

TRANSCRIPT OF MOTION FILED BY THE RESPONSIBLE PERSON
FOR ENTRY OF AN ORDER AUTHORIZING AND APPROVING
SETTLEMENT AGREEMENT AND RELEASES WITH DEFENDANTS,
JOSEPH LAURITA AND ADELINE LAURITA; DAUBERT MOTION FILED
BY THE DEFENDANTS TO EXCLUDE THE REPORT AND ANY
TESTIMONY OF PLAINTIFF'S EXPERT WITNESS; MOTION FILED
BY THE PLAINTIFF FOR SUMMARY JUDGMENT; MOTION FILED
BY ICONIX BRAND GROUP, INC. AND STUDIO IP
HOLDINGS, LLC FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE ROBERT E. GROSSMAN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES: (Continued)

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1 NEW YORK, NEW YORK, THURSDAY, NOVEMBER 4, 2014, 2 P.M.

2 THE CLERK: Case Number 09-15378, Signature Apparel
3 Group.

4 MS. SCHWARTZ: Your Honor, the U.S. Trustee doesn't
5 have a position with respect to this adversary. May I please
6 be excused?

7 THE COURT: Yes. Thank you.

8 MS. SCHWARTZ: Thank you.

9 THE COURT: Thank you for your help today.

10 MS. SCHWARTZ: Thank you, Your Honor.

11 THE COURT: Hold it. Hold it, hold it, hold it.
12 Okay. Let's get appearances.

13 MR. KOEVARY: Good morning, Your Honor. Jonathan
14 Koevary, Olshan, Frome, Wolosky for the responsible person.
15 With me, Your Honor, are my colleagues, Kyle Bisceglie and
16 Ellen Holloman also from Olshan, Frome, Wolosky.

17 MS. HOLLOMAN: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. BISCEGLIE: Good morning, Your Honor.

20 MR. COGAN: Harris Cogan of Blank Rome for the Iconix
21 defendant, Studio IP Holdings and Iconix Brand Group. With me
22 are Andrew Hambelton and Michael Brownstein.

23 MR. SEIDMAN: Good morning, Judge. Mitchell Seidman
24 for Christopher Laurita and the New Star Group from Seidman &
25 Pincus. With me this morning are Andrew Pincus and Jeffrey

1 Kramer.

2 MR. KLESTADT: Good morning, Your Honor. Tracy
3 Klestadt of Klestadt & Winters for Joseph and Adeline Laurita.

4 MR. KOEVARY: Your Honor, we have several matters on
5 for this afternoon, starting with we have a 9019 motion. We
6 have, Your Honor, a pretrial conference. Then we have the main
7 event which is a summary judgment motion, dueling summary
8 judgment motions and a Daubert motion to go with that.

9 My suggestion, Your Honor, is to go in that order --
10 proceed in that order.

11 THE COURT: Which order?

12 MR. KOEVARY: The order -- beginning with the 9019
13 and going to the pretrial but we're happy to go in whatever
14 order Your Honor suggests.

15 THE COURT: There are objections to the 9019, aren't
16 there?

17 MR. KOEVARY: There is an objection, Your Honor, to
18 the 9019. I would call it more of a clarification request than
19 an objection. There's no -- it's brought by the Iconix
20 defendants. It's not brought on any reasonableness grounds.
21 They had asked us --

22 THE COURT: I'm not asking for an argument about it.
23 I'm just asking is there an objection.

24 MR. KOEVARY: Yes, Your Honor. There is an
25 objection.

1 THE COURT: Okay. So do you want to do that or are
2 the other aspects of the case -- do we need to do those before
3 we do the 9019?

4 MR. KOEVARY: I really don't believe so, Your Honor.

5 THE COURT: Anybody have a view? Anybody care?
6 Okay. Do the 9019.

7 MR. KOEVARY: Okay. Your Honor, the 9019 is a
8 settlement with husband and wife defendants to two litigations;
9 one of the adversary proceedings is what's on for -- the
10 summary judgment motion on for today. The other adversary
11 proceeding is not on for today but it's on for trial still with
12 other defendants later this month.

13 The settlement calls for to receive a million dollars
14 from these two individuals over a two-year period. It is
15 secured, Your Honor, by a confession of judgment to be held in
16 escrow --

17 THE COURT: The argument is you're settling one of
18 the cases for nothing.

19 MR. KOEVARY: No, Your Honor. I don't read that --

20 THE COURT: That may not be true but that's the
21 argument.

22 MR. KOEVARY: That's not how we read it. We read the
23 opportunity -- we ready the objection as asking how are we
24 apportioning the settlement.

25 THE COURT: And, yeah, I'm -- unless I tell you

1 otherwise, assume I read the stuff. The objection -- you may
2 not agree with it and these guys can speak to it, the way it
3 reads to me is you're settling multiple cases for a million
4 dollars which has been paid over time. I'm not sure there's a
5 problem with the million dollars. There's a problem because of
6 an indemnification possibility that a certain amount of that
7 money should be allocated in some form other than you're
8 allocating it because the argument is in the case where they're
9 getting zero or you're allocating zero, there are
10 indemnifications so that if money were paid, the remaining
11 defendants of which some of these guys represent, would be on
12 the hook for less. That's the argument. So just tell me why
13 they're wrong.

14 MR. KOEVARY: Your Honor, I -- Your Honor, when we've
15 -- let's step back. We've apportioned this, Your Honor, based
16 upon what we've learned in discovery and what we've essentially
17 learned through discovery is that when it comes to the case
18 that's on for today, the Iconix transaction, that's not really
19 a role as we understood -- we understood -- as we understand
20 it, Joseph and Adeline Laurita didn't really have a role in
21 that case. What discovery has shown us --

22 THE COURT: Are they named in that case?

23 MR. KOEVARY: They are named in that case, Your
24 Honor.

25 THE COURT: Who named them?

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MR. KOEVARY: Your Honor, the responsible person
named them but --

THE COURT: That's you.

MR. KOEVARY: Yes, Your Honor, that's our client.
And our view and understanding of the case and the basis for
our apportionment is on several grounds and on one of the
grounds for the -- why the apportionment is we looked to see
what actions were done by whom and the actions that we saw that
were done by the alleged -- the allegations, what we saw are
that Joseph and Adeline Laurita were, as we see it,
coconspirators but not the primary beneficiaries of the co-
conspiracy, and they really weren't involved as far as we could
tell with the Iconix transaction --

THE COURT: They had -- your view is they have no
liability under that case.

MR. KOEVARY: They have no liability under that case.
Yes, Your Honor.

THE COURT: All right.

MR. KOEVARY: They have liability we believe, joint
and several liability under the other case.

THE COURT: I'm just asking. So the reason you
apportioned this is you feel in the case the parties are
objecting that you're not giving any credit to, these two
defendants have no liability.

1 MR. KOEVARY: Correct, Your Honor.

2 THE COURT: So you could basically just drop them
3 from the litigation if you wanted.

4 MR. KOEVARY: Absolutely, Your Honor, and that's what
5 -- that's exactly what this does because the 9019 --

6 THE COURT: This is a settlement. You're not
7 dropping them. You're settling it. There's a difference.

8 MR. KOEVARY: We're settling but we're going to --
9 yes, we're settling both but we're going to dismiss the case.

10 THE COURT: Okay.

11 MR. KOEVARY: Vis-a-vis the settling defendants.

12 THE COURT: You get a million dollars and it's all
13 being applied to the other case where -- period.

14 MR. KOEVARY: Yes, Your Honor.

15 THE COURT: Okay. Let me hear -- that's their --
16 that's the sole objection.

17 MR. COGAN: Thank you, Your Honor. Harris Cogan on
18 behalf of the Iconix defendants. Your Honor stated our
19 objection correctly.

20 What's happening here is there is an allocation of
21 zero to a claim of joint tortfeasors where the claimed damages
22 is \$18 million. They are claiming --

23 THE COURT: Well, now they're claiming that those two
24 folks who are settling have no liability in this case.

25 MR. COGAN: And I find that rather surprising that

1 after four years of litigation they can come in and say that
2 the principal of the company in which they allege all types of
3 wrongdoing, in which they have come to court time and time
4 again screaming about wrongdoing suddenly has no -- has not
5 been involved in any way whatsoever simply by a statement, a
6 conclusory statement in an affidavit that they moved to
7 California after the facts and therefore they're not as liable.
8 I submit Your Honor --

9 THE COURT: He's the plaintiff. He says he doesn't
10 have a case against these two.

11 MR. COGAN: Well, first of all, there's only a case
12 against Joseph Laurita. Adeline Laurita is not a party to --
13 but it's -- for somebody to get up and say I have wasted this
14 Court's time in years of litigation and have suddenly concluded
15 that I have no case, you need more than that. They came in and
16 they said we have a million-dollar settlement of the two cases.
17 That's not what they said on their motion.

18 In other words, on their motion, they came in and
19 said we want to settle a million dollars -- for a million
20 dollars; we're settling both cases. It was only when we
21 objected and said you've got to apportion because under General
22 Obligations Law 15-108, the failure to apportion prejudiced us
23 significantly. So we said you've got to apportion.

24 What they decided to do is say in reply we have no
25 case? I appreciate the fact that they are now conceding --

1 THE COURT: Well, but part of the elements of this
2 case are joint tortfeasors, correct?

3 MR. COGAN: Correct.

4 THE COURT: So it's hard to have a joint tortfeasor
5 if you only have one.

6 MR. COGAN: Well, they are alleging and have alleged
7 that every defendant has been involved in this joint conspiracy
8 to defraud. Apparently, they now believe that the principal of
9 the debtor company has not been involved whatsoever. I think
10 they have to present more to this Court to simply say we are
11 settling for zero.

12 THE COURT: Again, I'm not -- I mean, this is a 9019.
13 We went through this before. Now, there could be
14 ramifications. I guess the argument being presented to the
15 Court is not that we're settling a claim because we can't prove
16 it or this, that, or the other. The argument is there is no
17 claim, that they've shown that these two -- one person I guess,
18 relative to this case had no role, has no liability.

19 That may have consequences in the rest of the
20 lawsuit, I don't know --

21 MR. COGAN: No, I think --

22 THE COURT: -- but I think that's the plaintiff's
23 trustee's decision that he does not believe that he can
24 adequately prove any liability to this person in this case.
25 That's his decision. I don't have any problem with that.

1 MR. COGAN: Well, I appreciate the concession by the
2 plaintiff that he has concluded that there was no conspiracy by
3 Mr. Laurita --

4 THE COURT: Well, but I -- you make your argument.
5 I'm sure he'll --

6 MR. COGAN: That's his concession.

7 THE COURT: All right.

8 MR. COGAN: But on a 9019 there is some standard that
9 has to be met, and zero dollars is not meeting that standard --

10 THE COURT: You mean the estate is getting a million
11 dollars.

12 MR. COGAN: The estate is getting a million dollars
13 for settlement of a claim for misappropriation of \$7.8 million.
14 I don't contest that settlement. I'm not a party to that
15 lawsuit either --

16 THE COURT: No, they're getting a settlement on 18
17 million.

18 MR. COGAN: No, they're getting a settlement --

19 THE COURT: On both cases.

20 MR. COGAN: On both cases.

21 THE COURT: And didn't you say your case is 18
22 million?

23 MR. COGAN: Yes. The case against us they are
24 claiming 18 million of damages. The claim -- the case of
25 misappropriation by the Lauritas in which Iconix is not

1 involved whatsoever is a claim of 7.8 million. They're now
2 claiming that they will settle one case for a million dollars.

3 THE COURT: No, they're settling both cases --

4 MR. COGAN: But giving --

5 THE COURT: -- for a million dollars.

6 MR. COGAN: -- zero -- there's -- and I submit a zero
7 settlement is not a settlement. If they want to say that they
8 are discontinuing with prejudice, if they want to say that they
9 have determined that there is no wrongdoing on the part of
10 Joseph Laurita, that's fine but they can't settle the case for
11 a million dollars.

12 THE COURT: What if he allocated a thousand dollars?

13 MR. COGAN: Well, then I think this Court would then
14 have to look and say is a thousand dollars realistic, does it
15 meet the standard -- and a thousand dollars for an eighteen-
16 million-dollar claim, I mean we believe this eighteen-million-
17 dollar claim has no merit but I believe a thousand dollars
18 doesn't meet that standard. They have to show why they believe
19 that it's in the interest of the estate to settle for a
20 thousand dollars.

21 THE COURT: Why wouldn't you just discontinue it,
22 take the whole million, put it on the other place and just
23 discontinue it. Discontinue this case.

24 MR. KOEVARY: Your Honor, I think that's something we
25 could do vis-a-vis -- I mean, I think --

1 THE COURT: Well, you'd eliminate this objection
2 completely.

3 MR. COGAN: Well, I have a problem with a continuance
4 with prejudice to some extent and that is because if there is a
5 finding of joint tortfeasor relationship which we don't believe
6 will happen here under GOL 15-108, there has to be a
7 determination of the fault of the various parties including a
8 settling defendant because what happens in a joint tortfeasor
9 situation under the General Obligations Law 15-108 is that if
10 you settle with one of the defendants and there's a fine thing
11 of a conspiracy, then what you have to do is credit the greater
12 of the culpability or the amount of the settlement.

13 THE COURT: But they've determined there is no
14 culpability.

15 MR. COGAN: Well, their determination I don't think
16 is binding on the Court --

17 THE COURT: Here's a question. So if I approve the
18 settlement, Mr. Klestadt's client, correct?

19 MR. KLESTADT: Yes, Your Honor.

20 THE COURT: If I approve the settlement and we go to
21 trial and at trial it's shown that they were in fact joint
22 tortfeasors but there's a release so nobody can go after them,
23 is there a consequence to that?

24 MR. COGAN: Yes. Let's take hypotheticals.
25 Obviously, again we say there will be no proof, no

1 establishment of liability. Let's assume that this Court finds
2 a million-dollar damages on all of the joint tortfeasors. Now,
3 there's been a settlement already with the Azrak defendants for
4 \$400,000. And let's assume that they apportion \$500,000 to
5 this particular settlement or they do zero. Let's assume they
6 do zero for this settlement but the Court determines that
7 Joseph Laurita was fifty-percent liable for this alleged
8 conspiracy. That million dollars would have to be reduced by
9 his fifty-percent interest, 500,000 as well as the 400,000.

10 THE COURT: So I'm still free even after the
11 settlement to find that these folks have liability; it's just
12 that they've been -- that in your case but you just can't
13 collect against them. So you would get a -- in your mind, you
14 would get a credit if there were a way one could apportion the
15 liability.

16 MR. COGAN: That is correct, but they have to be
17 defendants in the case.

18 THE COURT: Do you agree with that?

19 MR. KOEVARY: I think maybe that's right, Your Honor.
20 I have to give that some thought but I think that's not an
21 issue for the 9019 motion. That's not an issue for -- is this
22 today for the best interest of the estate.

23 THE COURT: I kind of know what that means. I'm
24 asking a specific question. Mr. Cogan just made an argument
25 that even I grant the 9019 and the -- Mr. Klestadt's clients

1 are released from any financial liability, they are still part
2 of the lawsuit because they've never been -- you've never
3 discontinued it as to them, or even if they're not part of the
4 lawsuit, take it that way, they're not part of the lawsuit, but
5 at trial it's established they did have a role and that role
6 was a certain percentage, and therefore, all you could collect
7 against the other defendants is a net number.

8 Do you agree with that?

9 MR. BISCEGLIE: Your Honor, I'm just -- for
10 expediency. I believe that it would only apply to the tort
11 claim. So, if there's a breach of claim against Iconix, there
12 wouldn't be a reduction under 15 --

13 THE COURT: But that's a question of law. You
14 believe it conceptually. Even though the parties are released,
15 there's still an allocation of liability that can affect what
16 the remaining defendants would have to pay.

17 MR. BISCEGLIE: Correct. Under the tort theories,
18 Your Honor, I mean that was a correct statement of law.

19 THE COURT: All right.

20 MR. BISCEGLIE: Under 15-108 and can actually be the
21 beneficiary of that. If we're settling for the wrong amount,
22 they would still have a reduction in their judgment by
23 percentage of liability that Joe Laurita had because it's the
24 greater of, the percentage of liability or the amount paid.

25 MR. COGAN: And that is why the allocation is

1 important because it's the greater of the liability --
2 percentage liability or the amount paid. So, in a situation
3 where for argument's sake there is a million dollars of damages
4 and let's assume that Mr. Laurita is found to be ten percent
5 liable but they settle for a hundred -- \$200,000 as allocated,
6 we would get credit for \$200,000 in that situation.

7 THE COURT: That frankly is too esoteric for me.

8 MR. COGAN: Well, that's why I believe that you can't
9 simply allocate zero.

10 THE COURT: The trustee is -- believes that there's
11 zero value to this. That's why he's settling. If it's shown
12 that zero is a million, then the trustee would have given away
13 a million dollars for nothing and that would be his business
14 judgment.

15 And, again, whether you would do it or someone else
16 would do it is not the question. The question is does this
17 meet the reasonableness -- the lowest standard for the estate.
18 This is an interesting one because there are multiple
19 litigations so it's not necessarily beneficial to a particular
20 -- a case within this estate but it does meet to me a minimal
21 standard.

22 Now, I think that as the case goes on, if at trial
23 it's shown -- you know, there's no hindsight but if it's shown
24 that what was settled for zero was worth millions of dollars,
25 you could question -- I guess question the trustee but I think

1 with that predicate that your clients -- because if no
2 liability were shown, then settling for zero doesn't affect you
3 at all. If they had no liability as they argue, then whether
4 he settled for zero doesn't matter. And you still get an
5 opportunity to apportion liability and get a credit against
6 whatever you may -- your client may owe and that the trustee
7 would not be able to collect, he's walking away from it.

8 So, if he wants to allocate zero but that -- I don't
9 -- based on this argument, I think I'm hard-pressed to -- I
10 accept your objection but I think this argument goes a long way
11 for me to understand that the trustee is moving ahead with a
12 case against other folks as joint tortfeasors, conspiracy, all
13 those other things and yet taking the position as you say that
14 the party who ran the company -- I'm not sure he ran it -- was
15 the major -- a major player within the company has no
16 liability.

17 Fine, that's their position.

18 MR. COGAN: I understand, Your Honor.

19 THE COURT: So I think with that being said, I think
20 yours was the only objection to this.

21 MR. COGAN: That's correct.

22 THE COURT: As long as the trustee wants to go ahead,
23 I'll grant that motion.

24 MR. KOEVARY: Thank you, Your Honor.

25 MR. COGAN: Thank you, Your Honor.

1 THE COURT: All right. I mean, the record is pretty
2 clear now.

3 MR. KOEVARY: If we haven't already, we'll submit an
4 order.

5 MR. COGAN: I would like the order to reflect that
6 the right of apportionment remains.

7 THE COURT: Well, you're going to have a real bear
8 trying to write this but I understand that, and that's why I
9 made a record today but I'm not going to let you go too far in
10 the order but you can reference the argument that was made in
11 court and the representations of the trustee, of the interested
12 party.

13 MR. COGAN: All I would say I think is that --

14 THE COURT: He agreed --

15 MR. COGAN: -- our rights under GOL 15-108 remain
16 with respect to --

17 THE COURT: Their position was they have a difference
18 of whether it applies to contract or torts but as a statement
19 of law, the responsible party's position was they agree with
20 you. So you shouldn't have any trouble putting this in.

21 MR. COGAN: Thank you, Your Honor.

22 MR. KOEVARY: We'll work with them. I think --

23 THE COURT: Show Mr. -- obviously show all the
24 relevant parties the order before you submit it.

25 MR. KOEVARY: Thank you, Your Honor.

1 THE COURT: The Court will grant that motion.

2 MR. KOEVARY: Thank you, Your Honor.

3 Your Honor, just before summary judgment, the other
4 matter which is with the related parties is the pretrial
5 conference -- the initial pretrial conference on a four-
6 hundred-thousand-dollar preference action brought against an
7 affiliate of Iconix, Artful Holdings, and we have submitted, I
8 hope Your Honor received -- otherwise, I can -- if I may
9 approach, Your Honor, with an initial proposed pretrial order
10 on this that would have discovery completed --

11 THE COURT: Does everybody agree on this one?

12 MR. COGAN: Yes, Your Honor.

13 THE COURT: Okay. Just hand it up. Not to me. Put
14 it over there. When does it set a trial for this?

15 MR. KOEVARY: Dis -- it doesn't -- using --

16 THE COURT: When are dispositive motions?

17 MR. KOEVARY: Dispositive motions by March 6th, 2015.

18 THE COURT: Fine with me.

19 MR. KOEVARY: Okay. Thank you, Your Honor. I think
20 with that, that brings us onto the summary judgment motions and
21 if I may go ahead and turn the lectern over to my colleague,
22 Kyle Bisceglie.

23 THE COURT: We have cross-motions for summary
24 judgment, don't we?

25 MR. BISCEGLIE: We do, Your Honor.

1 THE COURT: You want to flip a coin? Who goes first?

2 MR. BISCEGLIE: I'm happy to go first and keep it
3 short.

4 MR. COGAN: I would like to go first and we'll delve
5 into the arguments.

6 MR. BISCEGLIE: Whatever Your Honor prefers, it's
7 fine. We're the plaintiff but whatever is the most efficient
8 and helpful to the Court is fine by us.

9 THE COURT: Actually for once you guys agree on
10 something. Seriously.

11 MR. BISCEGLIE: Mr. Cogan is welcome to go first.

12 THE COURT: Good. Thank you.

13 MR. BISCEGLIE: My partner is going to kick me when I
14 get back to -- I was told never to do that but...

15 MR. COGAN: Thank you, Kyle. I appreciate it.

16 MR. BISCEGLIE: You're welcome.

17 THE COURT: Go ahead.

18 MR. COGAN: Thank you, Your Honor.

19 In spring 2009, the Laurita brothers, one of whom has
20 just been released who are the principals of Signature Apparel
21 Group recognized that they could not continue their license
22 with Studio --

23 THE COURT: Just tell me who you represent.

24 MR. COGAN: We represent Studio IP and Iconix.

25 THE COURT: Okay.

1 MR. COGAN: Studio IP is an affiliate of Iconix and
2 we were the -- Studio was the licensor of the license in issue.
3 Okay. And again Signature had a license through Studio IP for
4 the sale of Rocawear branded junior sportswear apparel.

5 In spring 2009, the principals of Signature, the
6 Laurita brothers recognized that they could not continue their
7 license with Studio IP. They were indebted to their factor,
8 CIT. They couldn't pay their manufacturers for merchandise,
9 and they owed Studio IP about \$7 million.

10 They told Iconix -- and I'll use Iconix and Studio IP
11 interchangeably. They told Iconix that they could not continue
12 with a license and tried to find an investor or some other
13 transaction. They tried for months and months and they failed.

14 In August 2009, Studio IP sent a notice of default to
15 Signature. It said it would still work with Signature to see
16 if some deal could be done but it wanted to light that fire
17 under them to make sure a deal was done or that the license was
18 over as they told them.

19 Now, Signature had been in discussions with
20 individuals named Azrak, Ruby Azrak, Charles Azrak, about a
21 potential transaction, and before the cure period was over,
22 they requested a brief extension of the cure period under the
23 notice of default which Iconix granted.

24 During this period, Signature was represented by
25 Riker Danzig and they had also retained Ansell Grimm & Aaron

1 [sic] for advisory services. Now, twenty-two minutes before
2 the expiration of the cure period on September 4, 2009, the
3 three Hong Kong manufacturers for Signature filed an
4 involuntary petition. And global negotiations then ensued.

5 Michael Fox of the Olshan firm who was then
6 representing the petitioning creditors circulated a memo on
7 September 11 outlining the terms of a global settlement, and
8 that memo served as the basis for a resolution that was reached
9 by all the parties.

10 THE COURT: So, on the date the involuntary was
11 filed, the license as a matter of law was or was not
12 terminated?

13 MR. COGAN: It had not been terminated by a notice of
14 termination. However, it had already been repudiated in the
15 sense that Iconix was told that the license would not continue.

16 THE COURT: Again, do you believe as a matter of law
17 that the license between Iconix and Signature was terminated
18 prior to the filing of the involuntary?

19 MR. COGAN: It had not been formally terminated at
20 that time.

21 THE COURT: Okay.

22 MR. COGAN: Now, what happened with these global
23 negotiations as suggested by Mr. Fox was a resolution was
24 reached whereby Signature gave up its license, a new license
25 was entered into with ROC Fashions, LLC which is an entity

1 formed by the Azrak family. That new license provided for
2 significantly lower royalty rates and minimum sales
3 requirements, and ROC Fashions, the Azraks in turn paid the
4 petitioning creditors about two and a half million dollars for
5 all the merchandise they had on hand and agreed to continue to
6 buy from them. That was the deal that was struck.

7 THE COURT: Mr. Fox represented the petitioning
8 creditor --

9 MR. COGAN: Correct.

10 THE COURT: Who were suppliers.

11 MR. COGAN: That's correct.

12 THE COURT: He didn't represent Signature and he
13 didn't represent the licensor?

14 MR. COGAN: That's correct.

15 THE COURT: All right.

16 MR. COGAN: And the parties contemplated a structured
17 dismissal of the bankruptcy proceeding which unfortunately did
18 not happen. Now, years later, after the time for avoidance
19 actions under Section 549 have long passed and I point out Your
20 Honor as we cite cases in our brief that 549 is the exclusive
21 remedy to challenge a transaction like this. The responsible
22 person claims that the transaction was a violation of the
23 automatic stay and claims that all of the involved parties and
24 their counsel -- remember, Riker Danzig was involved, Sills
25 Cummis was involved with respect to the --

1 THE COURT: Which transaction was a violation?

2 MR. COGAN: The termination -- the agreement to
3 terminate the license and to enter into a new and different
4 license with ROC Fashions. So again what happened here was
5 Signature in the gap period agreed to give up the license and
6 in turn be relieved of further liabilities in the sense of they
7 knew this company was going down the tubes and ROC Fashions
8 entered into a new license. Olshan's clients, the petitioning
9 creditors were paid two and a half millions, and they agreed to
10 supply ROC Fashions in the future as well.

11 And the claim years later is that the transaction
12 somehow was a violation of the automatic stay and this was a
13 huge conspiracy to defraud and that there was a
14 misrepresentation of the Signature license with false
15 representations --

16 THE COURT: Was the two and a half million paid to
17 the petitioning creditor?

18 MR. COGAN: Yes, it was. By ROC Fashions.

19 THE COURT: They're not defendants in this case, are
20 they?

21 MR. COGAN: Well, that's curious. We --

22 THE COURT: Don't editorialize. They're not
23 defendants --

24 MR. COGAN: They are not defendants in this action.
25 No.

1 Your Honor, this claim of conspiracy could not be
2 further from the truth. Everyone was well aware of the
3 license. Iconix as I've said just now acknowledges that a
4 notice of termination had not been sent. Obviously, Signature
5 knew that since they got the notices. A memo from their
6 counsel at Riker Danzig discusses his review of the file and
7 notes that a notice of default had recently been sent --

8 THE COURT: If Iconix had been asked by Signature to
9 modify the existing license, would they have done that?

10 MR. COGAN: If -- I'm sorry

11 THE COURT: If Iconix was asked by Signature Bank --

12 MR. COGAN: It's Signature Apparel.

13 THE COURT: By Signature Apparel rather than having
14 entering into a new license to amend the existing license and
15 move forward, would they have done that?

16 MR. COGAN: No, they would not. There was already a
17 situation where they had run the license down. They weren't
18 able to --

19 THE COURT: But yet they were willing to enter into a
20 new license with the same people.

21 MR. COGAN: No. They entered into a new license with
22 the Azrak family, a completely different group. The Lauritas
23 were the principals of Signature.

24 THE COURT: Right.

25 MR. COGAN: The Azrak family were the principals of

1 ROC Fashions, LLC. It was a new license with new people,
2 different terms.

3 THE COURT: And the Lauritas had nothing to do with
4 the new licensing.

5 MR. COGAN: The Lauritas had nothing to do with the
6 new licensing except there is a claim made that Christopher
7 Laurita received a consulting agreement from the new licensee,
8 ROC Fashions, but other --

9 THE COURT: Which is an exclusive license. You can't
10 have two people with the same license.

11 MR. COGAN: That is correct.

12 THE COURT: All right.

13 MR. COGAN: Okay. Now, there is no testimony or
14 document indicating that anyone from Iconix ever represented
15 that a notice of termination had been sent. The claim here is
16 that we defrauded them by claiming that the license had been
17 terminated. We never ever said that a notice of termination
18 had been sent.

19 THE COURT: But if a notice of termination had not
20 been sent and it was an exclusive license, how did you give
21 another person a license?

22 MR. COGAN: Because Signature agreed to give up the
23 license which they had the right to do under Section 303(f).

24 THE COURT: So there's an agreement between Signature
25 and Iconix giving up the license?

1 MR. COGAN: Exactly.

2 THE COURT: Post-petition.

3 MR. COGAN: Post-involuntary petition.

4 THE COURT: All right.

5 MR. COGAN: And post-involuntary petition --

6 THE COURT: You don't argue the stay is not in place

7 on an --

8 MR. COGAN: I'm not suggesting the stay is not in
9 place. What I am suggesting, Your Honor, though is that under
10 Section 303(f) of the Code, disposal of assets during the
11 involuntary, during the gap period is perfectly permitted by
12 the debtor. And, in this situation, that's what happened. We
13 have a situation where Signature agreed to give up the license.

14 THE COURT: But if the termination of a license post
15 -- we'll say petition rather than keep saying involuntary,
16 post-petition, was a violation of the stay then that would be
17 void.

18 MR. COGAN: If Iconix had sent a notice of
19 termination that would have been problematic.

20 THE COURT: But the tacit agreement to accept the
21 termination you say is different from actually sending an
22 agreement -- a letter?

23 MR. COGAN: That's correct, Your Honor, because
24 303(f) specifically provides that you can have a disposal of
25 assets during the gap period even, the cases say, outside the

1 ordinary course of business.

2 THE COURT: If those assets have value?

3 MR. COGAN: Absolutely. 303(f) specifically provides
4 for that. And the case law specifically provides for that,
5 that -- the concept is that if there is an involuntary filed,
6 the debtor is permitted to continue to operate the business as
7 --

8 THE COURT: Does the asset have any value in your
9 mind?

10 MR. COGAN: No. And I'll get into that in a second -
11 - I'll jump to that right now. Let me explain something about
12 this asset. First of all, as a matter of law -- I mean, we'll
13 get to whether there was any misrepresentation. I'll come back
14 to that and I'll address Your Honor's question.

15 First of all, as a matter of law, a trademark license
16 which is what this is, cannot be assigned without the
17 licensor's consent. We cite Colliers on Bankruptcy. We cite
18 Seventh Circuit cases, Southern District cases, what is called
19 the universal rule that a trademark license is in the nature of
20 a personal services contract, and therefore, even if it was
21 property of the estate, Signature could not assign it without
22 our consent.

23 But let's assume that they could assign it without
24 our consent. Let me explain a few facts about this license and
25 this will be relevant to the Daubert motion as well. This

1 license had fifteen months remaining on its term. September
2 2009 is when the -- was when the involuntary was filed.
3 December 2010 is when the license expired. It had no renewal
4 rights. It had \$7.4 million in default and its royalty rates
5 and minimum requirements were way above market and there's no
6 dispute about that.

7 So I ask you, Your Honor, what would have happened if
8 this was property of the estate. What would have happened is
9 as a matter of law, the trademark license could not be
10 assigned. What would have happened is that nobody in their
11 right mind would pay anything to obtain a trademark license
12 where they would have to satisfy the \$7.4 million under Section
13 365 of the Code.

14 THE COURT: Who would have -- who would they have had
15 to satisfy?

16 MR. COGAN: They would have had to have satisfied
17 Iconix.

18 THE COURT: Yet Iconix granted another company the
19 exact same license --

20 MR. COGAN: Absolutely not. Iconix did not grant the
21 exact same license.

22 THE COURT: What did it grant?

23 MR. COGAN: What they did was entered into a license
24 with somebody else who was in the industry and who had
25 capabilities and they gave a five-year license, an expanded

1 license with different terms, lower rates, different minimums
2 and the like.

3 They can't be forced to enter into a license with
4 anybody. What would have happened -- assuming their arguments
5 that this was a violation of the automatic stay and, Your
6 Honor, during the gap period under Section 303(f), it was not a
7 violation of the automatic stay. It was a disposal of assets
8 perfectly permitted but assuming that we now put this Signature
9 license back to -- as property of the estate, they couldn't
10 have done anything with it because a cure of the arrearages was
11 a necessary element of any assignment under Section 365 and
12 nobody was prepared to buy a fifteen-month term license at
13 above-market rates and cure 7.4 million at the same time.

14 So we have a situation where there was no fraud,
15 there was no misrepresentation --

16 THE COURT: Well, is it your position that if
17 something is not assignable it's not assumable?

18 MR. COGAN: That's correct. Well, they could assume
19 it. They could -- the -- Signature could have assumed the
20 license. In other words, they could have elected to assume an
21 executory contract. Yes, they could have elected but they
22 couldn't assign it.

23 THE COURT: So even though it's not assignable, the
24 debtor could assume it to you.

25 MR. COGAN: The debtor if it cured the defaults, it

1 could have elected to assume the executory contract provided it
2 cured the 7.4 million in default.

3 THE COURT: All right. I'm just wondering because
4 there's a split within the cases about whether if something is
5 not assignable it can even be assumed but...

6 MR. COGAN: Now, Your Honor, I'd like to go back to
7 their allegations of fraud and so forth. Again, their claim is
8 that Iconix and the Lauritas and everybody involved made a
9 misrepresentation that the license had been terminated. Joseph
10 Schwartz of Riker Danzig --

11 THE COURT: Let me just interrupt -- let's stay with
12 the summary judgment. Fraud is never going to be in simplistic
13 world the subject of a summary judgment motion. So the summary
14 judgment as I understand this which is a question of law is
15 you're taking the position that the license -- one was -- even
16 if it was an asset of the estate but during the gap period, the
17 debtor properly could basically terminate it.

18 MR. COGAN: Agree to terminate it.

19 THE COURT: Agree to terminate it. The debtor did in
20 fact agree to terminate it and then you guys did whatever you
21 wanted to do.

22 MR. COGAN: That's correct.

23 THE COURT: So the issue is whether the debtor did in
24 fact agree to terminate the license. That's really the sole
25 issue for summary judgment. Everything else --

1 MR. COGAN: No, it's not the sole issue for summary
2 judgment because even if there is a -- somehow an issue of fact
3 with respect to that which we don't believe there is, there
4 still is unequivocally no right to assign and no right and no
5 damages.

6 THE COURT: No, but the debtor is not arguing --
7 well, I don't know what the debtor is arguing but if we both --
8 if you agree that the debtor could assume it, even though it's
9 not assignable because that's what you just said, then you
10 precluded the debtor from assuming it. Whether anybody in his
11 "right mind" would have done it is a different issue but if the
12 debtor had a right to assume it and it was property of the
13 estate, then the debtor's argument is it's an asset of the
14 estate that was diverted from us.

15 MR. COGAN: And what you have to do in that situation
16 if that argument is correct is value the asset.

17 THE COURT: Which would be a question of fact.

18 MR. COGAN: No. It would be a question of fact if
19 the license A, could be -- they already said they couldn't make
20 a go of it. They acknowledged that. And I want to get what
21 their own attorney said. Okay. At deposition, their own
22 attorney, Signature's attorney said -- from Riker Danzig --
23 that he and his client concluded that it was financially
24 impossible for Signature to continue under the license, that
25 they had no legal right to assign it, and even if it could be

1 assigned, that any such assignment would have required the cure
2 of the 7.4-million-dollar default, and therefore, according to
3 counsel, Signature with advice of counsel went ahead and
4 decided to agree to give up the license. There is no issue of
5 fact with respect to that.

6 In fact, Your Honor, I'd like to jump for a moment to
7 the Wagoner rule, the in pari delicto rule. There is a claim
8 here of fraud, of breach of contract, all those types of things
9 but the rule under Wagoner is that if the debtor's principal
10 was -- had knowledge of the alleged unlawful conduct or
11 participated in the alleged unlawful conduct, that that
12 knowledge and those activities are imputed to the trustee or in
13 this situation the responsible person. The responsible person
14 cannot come here and say well, I know that Signature
15 voluntarily --

16 THE COURT: Is part of your summary judgment a
17 standing argument?

18 MR. COGAN: Yes.

19 THE COURT: So you're saying even though -- you're
20 saying Wagoner which is different from in pari delicto is a
21 standing the second --

22 MR. COGAN: It's -- well, it's both.

23 THE COURT: I've written a lot about this
24 unfortunately. Normally, Wagoner is applied when you're
25 dealing with a professional, I think almost exclusively. We

1 never found a case where it's not. Now, the in pari delicto
2 question which is whether -- if they're alleging that you were
3 a coconspirator with them to defraud the company, that's an in
4 pari delicto argument.

5 MR. COGAN: Correct.

6 THE COURT: All right.

7 MR. COGAN: And if the principals of the company were
8 engaged in that fraud or had knowledge of that fraud, then they
9 can't -- the responsible person/trustee cannot come back and
10 make claims about that when the principals of Signature
11 participated in that. That's the Wagoner rule or the in pari
12 delicto rule.

13 So we raise that as an issue. I'd like to point out
14 something, Your Honor, which is very --

15 THE COURT: Just clarify that. Your argument is that
16 the responsible person has no standing to bring this action.

17 MR. COGAN: Has no standing because of --

18 THE COURT: Right.

19 MR. COGAN: -- Wagoner as well as the in pari delicto
20 defense.

21 THE COURT: Right. So it's a standing question.

22 MR. COGAN: Correct.

23 THE COURT: All right.

24 MR. COGAN: Okay. I'd like to point out what's very
25 interesting is a -- what they claim is the alleged fraudulent

1 statements that Iconix made to this Court. Now, what they rely
2 on are not statements made by Iconix because despite huge
3 discovery in this case, numerous depositions, thousands and
4 thousands of documents, you will not see any document
5 whatsoever from Iconix stating that it terminated the license
6 by a notice of termination.

7 Instead, what you will see is an objection filed by
8 the Olshan firm when they represented the Creditors Committee.
9 And, at that time, what they said was -- and I want to quote it
10 --

11 THE COURT: Your client -- let me just -- was it your
12 client that paid the Olshan firm's petitioning creditor
13 clients?

14 MR. COGAN: No.

15 THE COURT: Who paid them?

16 MR. COGAN: ROC Fashions, the new licensee.

17 THE COURT: And was that part of that overall
18 transaction?

19 MR. COGAN: Yes.

20 THE COURT: So ROC took a new license from you --

21 MR. COGAN: Correct.

22 THE COURT: And the creditors of Signature,
23 petitioning creditors got paid.

24 MR. COGAN: That's correct.

25 THE COURT: And that was orchestrated or represented

1 by Mr. Fox at the Olshan firm who was representing those
2 petitioning creditors.

3 MR. COGAN: Correct. Exactly.

4 THE COURT: Okay.

5 MR. COGAN: I had the same reaction.

6 THE COURT: No, I don't have any reaction.

7 MR. COGAN: Okay. When Olshan represented the
8 Creditors Committee, it submitted various objections to various
9 motions, and in its description of the procedural history, it
10 wrote as follows:

11 "When it became clear that the debtor could no longer
12 perform its obligations under the Iconix licenses, the debtor
13 and Iconix agreed to terminate the license."

14 That is what they wrote. That was the understanding
15 that the debtor and Iconix agreed to terminate the license.

16 THE COURT: Who wrote that?

17 MR. COGAN: That was written by Olshan firm --

18 THE COURT: On behalf of the Creditors Committee.

19 MR. COGAN: -- on behalf of the Creditors Committee.

20 THE COURT: Not on behalf of the debtor.

21 MR. COGAN: That is correct.

22 THE COURT: All right.

23 MR. COGAN: Okay. But to the extent that there is a
24 claim here that the creditors were defrauded, that nobody knew
25 what was going on, that there was this big fraud, I think that

1 this statement speaks volumes. Your Honor, you will not see
2 again a statement by Iconix that they terminated the license by
3 notice of termination. There is an e-mail from Andrew Eckstein
4 of Blank Rome in which he says the licenses were terminated but
5 there is no statement whatsoever that it was done pre-petition,
6 post-petition, by notice, or whatever. There is simply no
7 claim of -- no basis to claim misrepresentation.

8 They're also claiming, Your Honor, that the 2.5-
9 million-dollar consulting agreement that was entered into by
10 ROC Fashions, the new licensee, and Christopher Laurita's
11 entity New Star, that somehow this constituted a breach of
12 fiduciary duty which I will let Mr. Laurita's counsel address
13 but they claim that Iconix aided and abetted that and that
14 they're guilty of aiding and abetting a breach of fiduciary
15 duty.

16 Again, you will not see one document whatsoever that
17 Iconix was involved in that consulting agreement. What they
18 write, what they rely upon is that in the months before the
19 involuntary was filed where there were some discussions about a
20 potential joint venture between Signature and ROC -- and the
21 Azrak family in some e-mails there was a discussion that the
22 Lauritas would be involved in that and might receive
23 commissions.

24 There is no testimony from anybody that Iconix was
25 aware of a 2.5-million-dollar consulting agreement. What's

1 interesting is that when there was a settlement relatively
2 recently reached with the Azraks in which they agreed to pay
3 \$400,000 to settle this eighteen-million-dollar claim, they
4 extracted an affidavit from Charles Azrak as a condition of the
5 settlement in which what Mr. Azrak said was that in the
6 negotiations the COO of Iconix suggested that -- for transition
7 purposes it would make sense for the -- for Christopher Laurita
8 to be involved in the company in the transition period.

9 That does not meet the legal standard of substantial
10 assistance of a breach of fiduciary duty. So there is no
11 possible claim here that Iconix participated in any --

12 THE COURT: But their argument is whatever Laurita
13 got, he had a fiduciary obligation to give to Signature,
14 whatever he got.

15 MR. COGAN: But that's not problem.

16 THE COURT: That may not be in --

17 MR. COGAN: And, in order to establish that that --
18 you know, that's between them and the Lauritas, but you -- in
19 order to hold Iconix liable for that under a theory of aiding
20 and abetting a breach of fiduciary duty, you've got to show
21 that Iconic provided substantial assistance to this breach.
22 There is no testimony that we did.

23 All that we did at best according to an affidavit
24 that they got as part of a settlement, never testified to in
25 deposition what is we suggested that the Lauritas be part of a

1 transition, not that the Lauritas be given \$2.5 million but in
2 the transition get the Lauritas involved.

3 Your Honor, I submit to you that we are entitled to
4 summary judgment, both factually and legally. There is no
5 misrepresentation. There is no involvement in a fraud. There
6 is a right to agree to a termination of the license as they
7 said happened during the gap period under 303(f). They can't
8 come in and make these claims under the Wagoner rule. This is
9 simply a claim, Your Honor, years after the fact, after they
10 sued other people and were not successful. When they tried to
11 bring in Iconix because they're the deep pocket and to try to
12 come up with a claim against them, Iconix did nothing wrong
13 here.

14 THE COURT: Okay.

15 MR. PINCUS: I may, I think I -- I just put in a
16 joinder to his papers. I just want to be heard briefly on
17 that.

18 THE COURT: Who do you represent?

19 MR. PINCUS: I represent Chris Laurita and New Star.

20 THE COURT: Are you going to tell me anything
21 different than he said?

22 MR. PINCUS: I'm going to frame it a little
23 differently, Judge --

24 THE COURT: Don't tell me the same thing I don't want
25 to hear. If you've got something else, give it to me.

1 MR. PINCUS: The only thing I want to frame it as,
2 Judge, is I don't think they can prove their claims because
3 it's all just an issue of proximate cause. If you look at that
4 assignment issue, it becomes very simple in my mind. In order
5 for them to win, they've got to prove that but for this
6 transaction, they would have realized all this income and I
7 think they cannot get there because there is an inability to
8 assign under the law.

9 THE COURT: Why?

10 MR. PINCUS: Because the contract is a personal
11 service contract.

12 THE COURT: If the argument is that Christopher
13 Laurita had a fiduciary obligation to Signature and through his
14 conduct he diverted an asset that otherwise would have been a
15 value which is the argument to Signature, that's all I need.

16 MR. PINCUS: Judge, there can't be a diversion unless
17 there's ability to realize value from the asset, and our
18 argument is here that --

19 THE COURT: Well, if they stipulate it's valueless
20 then you're right.

21 MR. PINCUS: No, I'm not talking about that. I'm
22 stip -- what I'm looking for is a finding that it could not be
23 sold, the asset could not be transferred as a matter of law --

24 THE COURT: Is it it's valueless or it could not be
25 sold?

1 MR. PINCUS: Both. Both. Our position is both.

2 THE COURT: You think it's -- if your argument is
3 it's valueless and they agree with that, it's relatively
4 simple.

5 MR. PINCUS: Right.

6 THE COURT: So we'll see. If they agree that it was
7 valueless, then it's a simple case.

8 MR. PINCUS: Right. But I also want to stress that
9 there's an issue of law that it could not be sold as a matter
10 of law because it's a personal service contract and I think --

11 THE COURT: Or it could be assumed.

12 MR. PINCUS: It could be assumed but the debtor
13 didn't have the financial wherewithal to operate or --

14 THE COURT: I don't have a record based on that, on a
15 summary judgment.

16 MR. PINCUS: You're correct, Your Honor, but I think
17 their allegation is they would have been able to assign it
18 somewhere. Their whole contention is the debtor would have
19 given it to the Azraks in a Chapter 11 case.

20 THE COURT: Look, as you all know, there may be a
21 difference between what court can do after a complete record --
22 an evidentiary record is put together and what you can do on
23 summary judgment.

24 MR. PINCUS: That's correct. That's why I'm focusing
25 on the legal issue only, Judge. As a matter of law, I don't

1 think that this asset could have been sold as a matter of law.
2 And therefore there could not -- there's no cause of action.

3 THE COURT: Or it couldn't have been assumed, and if
4 it can be assumed, then you're dealing with what your
5 statement, that it was valueless or it doesn't matter whether
6 it was assumed or not.

7 MR. PINCUS: Right, but I don't think that's their
8 contention. Their contention is --

9 THE COURT: Well, if they disagree with that, then
10 the question is was it of any value.

11 MR. PINCUS: Thank you, Judge.

12 THE COURT: All right. You guys have anything to
13 say?

14 MR. BISCEGLIE: Yes, Your Honor.

15 THE COURT: Oh. Sorry.

16 MR. BROWNSTEIN: If I may --

17 THE COURT: Sure.

18 MR. BROWNSTEIN: -- I'm Mr. Cogan's partner. I'd
19 like to address if I can on the bankruptcy level the issue of
20 the assumption and assignment. Michael Brownstein from Blank
21 Rome for the Iconix defendants.

22 I think whether you take the actual or the
23 hypothetical test in respect of whether you can assume and
24 assign or not, I think the real issue from our perspective is
25 Iconix has the absolute right to preclude anyone from taking an

1 assignment of this asset, and that is what Mr. Cogan said
2 earlier so we would not have consented to an assignment. So
3 the assumption is moot from my perspective whether they could
4 or they couldn't because some courts say that you can assume it
5 and some courts say if you can't assign it, you can't assume
6 it.

7 So I didn't delve into that because from my
8 perspective the critical aspect of it, it's you can't assign
9 the contract because we won't consent to it leaving aside the
10 factual issue as to whether they have the wherewithal to assume
11 it or not --

12 THE COURT: But if the debtor's position is whether
13 or not they could have assumed it was taken out of their hands
14 by the actions of the parties. As a matter of law, if you take
15 the position that since it could not be assigned they could not
16 assume it then it's irrelevant what anybody did.

17 MR. BROWNSTEIN: And the point is I don't think the
18 law in the Second Circuit is clear.

19 THE COURT: It's not.

20 MR. BROWNSTEIN: I understand that but I looked at it
21 also from 303 under the Bankruptcy Code because from my
22 perspective there's clearly a tension between 303 and the
23 assumption and the assignment and if they had the right to
24 terminate this contract, then the issue is moot. They
25 terminated this contract under 303. That's clear. There was a

1 new agreement entered into. There was a new entity that came
2 in. That new entity paid the pre-petition -- the petitioning
3 creditors. They started operating with a new entity and the
4 debtor let it go. There is no question that that's what
5 happened here, and from my perspective, 303 trumps that issue
6 and we're done. It's really -- from my perspective, that's the
7 way I view it.

8 THE COURT: Okay. Thank you. You're up.

9 MR. BISCEGLIE: Thank you. Your Honor, Kyle
10 Bisceglie from Olshan Frome Wolosky representing Signature
11 Apparel.

12 Let me start I guess with standing since it's a
13 matter of law. The Wagoner rule which is a case from 1991 as
14 the Court well knows, I'm just shocked it's even being raised
15 in this case because all of the behavior that we're talking
16 about here is post-petition. It all occurred post-petition,
17 and there is in fact a case that Judge Glenn wrote, In Re: Food
18 Management, which is a 2008 bankruptcy decision, a very lengthy
19 discussion involving very similar circumstances of whether the
20 Wagoner rule and in pari delicto which are two separate
21 defenses apply, and he concluded that they do not apply to post-
22 petition conduct.

23 We cited in our opposition brief, Iconix doesn't cite
24 it at all. They simply keep harping on the Wagoner rule. In
25 the --

1 THE COURT: I thought their position with this was
2 there was a series of events that occurred including ones your
3 firm was involved with leading up to the filing of the
4 involuntary because I think Mr. Cogan said twenty minutes
5 before or something the filing of the involuntary there was an
6 agreement. Somebody had to have those negotiations.

7 MR. BISCEGLIE: We're suing on a post-petition
8 transfer that --

9 THE COURT: So nothing that occurred -- you're not
10 arguing that anything anybody did prior to the filing of the
11 involuntary is at all relevant to this case.

12 MR. BISCEGLIE: Not exactly, Your Honor.

13 THE COURT: Relevant would be the wrong word.

14 MR. BISCEGLIE: I'd say they're relevant facts --

15 THE COURT: Right.

16 MR. BISCEGLIE: -- however, the liability didn't
17 occur until there was --

18 THE COURT: I'm saying as a matter of law the
19 divestiture or the termination of the license if it occurred
20 was all a series of transactions and agreements post-petition.

21 MR. BISCEGLIE: Correct. The post-petition transfer
22 occurred after the petition.

23 THE COURT: And their 303 argument to you is?

24 MR. BISCEGLIE: Completely absurd. There is not a
25 single case that they cite nor is there a case in this great

1 nation where 303 has been held to relieve a debtor from the
2 effect of the automatic stay.

3 THE COURT: I don't think anybody is arguing the
4 automatic stay is not in place on a post-involuntary. They're
5 basically saying that the debtor in a gap period before the
6 order is entered has under 303 certain rights, and their
7 argument at least is that this transaction falls within the gap
8 period under 303, and therefore, there is no violation of the
9 automatic stay.

10 MR. BISCEGLIE: Right. Well, the problem with that
11 argument, Your Honor, is that they're effectively -- to have a
12 transaction, they would need to have terminated a license.
13 specifically the Signature license --

14 THE COURT: Well, the termination is the event that
15 everybody is arguing about here.

16 MR. BISCEGLIE: Sorry, Your Honor. So on September
17 4th, there was an automatic stay.

18 THE COURT: Right.

19 MR. BISCEGLIE: Right? As of that day, Mr. Cogan
20 admitted on the record that the license had not been formally
21 terminated, right? In fact, what he didn't mention was --

22 THE COURT: Why did your firm help negotiate a deal
23 post-petition?

24 MR. BISCEGLIE: We did not. A couple of things, Your
25 Honor. First of all, this entire issue has already been

1 litigated and resulted in a decision -- a disqualification
2 decision that Judge Peck decided. I mean, we spent six or
3 seven months working through all these issues. I'm surprised
4 that we see them again but that's fine. Just to be clear, pre-
5 petition we are representing factories that were creditors of
6 Signature. What we didn't know was that the license hadn't
7 been terminated.

8 THE COURT: So I'm just curious. At the time you
9 represented the factories and orchestrated a payment from the
10 new licensee to your clients was post-petition.

11 MR. BISCEGLIE: To be clear, I don't believe it's
12 true or relevant that --

13 THE COURT: I'll -- let me figure out what's
14 relevant for the moment.

15 MR. BISCEGLIE: Fair enough, Your Honor. So I don't
16 believe it's a fair characterization to say we orchestrated a
17 payment. I believe the goods needed to be shipped in order to
18 preserve the floor space for this license --

19 THE COURT: However your clients received two and a
20 half million dollars, I assume there was some legal documents
21 drafted but I don't care. The payment was made post-petition.
22 Is that right?

23 MR. BISCEGLIE: I believe that's the case, Your
24 Honor. I do not know.

25 THE COURT: Let's assume for a moment it was because

1 everybody tells me it is. If that payment was paid post-
2 petition --

3 MR. BISCEGLIE: Right.

4 THE COURT: And that's part of a transaction where
5 the party that paid your clients was taking the license that
6 was an exclusive license -- you couldn't have two people with
7 it -- did anybody look at whether in fact that transaction was
8 a violation of the automatic stay?

9 MR. BISCEGLIE: We did not at that time. We were
10 told that the license had been terminated according to its
11 terms.

12 THE COURT: So if you knew then what you knew now you
13 would have told your clients they couldn't take the money.

14 MR. BISCEGLIE: I'm not sure, Your Honor. I mean,
15 I'm just entirely not sure simply because I'm not a bankruptcy
16 lawyer to say -- and I wasn't the deal lawyer involved and --

17 THE COURT: Well, this is a highly technical case.
18 So I think you know enough -- hopefully you know enough
19 bankruptcy to get through it.

20 MR. BISCEGLIE: Right.

21 THE COURT: What's really in play on a summary
22 judgment as you know is solely issues of law. Most of what we
23 deal with, it's very difficult to isolate law and fact because
24 it's the intent of the parties, this, that and the other.
25 Standing is easy -- it's not an easy decision but it's an easy

1 thing to understand. And whether or not in my view all 500
2 pages that you all have given me is still down to the question
3 about whether the termination of the license had to occur which
4 was done post-petition was a violation of the stay or not. The
5 fraud aspects and everything else feeds off that because if the
6 license could be terminated, then that takes us in one
7 direction. If the license was a -- if terminating it was a
8 violation of the stay, then the termination is void as a matter
9 of law. That takes everybody in another direction. It doesn't
10 mean you'll prove damages ultimately but it certainly takes us
11 in another direction.

12 So your view is that the license termination which
13 was never documented in a light -- in a termination notice to
14 my knowledge post-petition was a violation of the automatic
15 stay. Is that correct?

16 MR. BISCEGLIE: Yes, Your Honor. Yeah.

17 THE COURT: Does it matter whether the license had
18 any value for it to be a violation of the stay?

19 MR. BISCEGLIE: Well, in terms of our ultimate
20 relief?

21 THE COURT: I don't care about your ultimate relief.

22 MR. BISCEGLIE: No. I would say it would not.

23 THE COURT: So, as a matter of law, the value of
24 something is irrelevant with regard to whether or not the
25 transfer of that was done in violation of the automatic stay.

1 MR. BISCEGLIE: Correct. And I would say -- I would
2 submit I find it hard to believe that the license that Rocawear
3 was given which was the same license that we had, slightly
4 different terms but for the same rights, and --

5 THE COURT: But you have a motion -- you have cross-
6 motions here which I --

7 MR. BISCEGLIE: Correct, Your Honor.

8 THE COURT: -- really never understand but your
9 summary judgment is that their view -- because you have to
10 accept at least for purposes of pleading the facts it's a
11 worthless license. That's their argument. Had no value.
12 They're \$7 million in the hole and they had an absolute right
13 to terminate it. As a matter of law, you're saying they had no
14 right to terminate it, and therefore, whatever it's worth they
15 violated the stay and everything that flowed from that creates
16 these damages that you're suing for. Is that --

17 MR. BISCEGLIE: I'd say it's a fair characterization.
18 It's just a little generalized so if I could say -- it's true
19 pre-petition they had the right to terminate the agreement.

20 THE COURT: All right.

21 MR. BISCEGLIE: They did. The agreement provided
22 they had to do a certain thing in order to terminate it which
23 is to provide written notice of termination.

24 THE COURT: Pre or post, do you have a right to
25 assign it without their consent?

1 MR. BISCEGLIE: Post, there is a provision in the
2 license agreement that would permit the assignment. There is a
3 process that needs to be followed.

4 THE COURT: So you're saying their argument that
5 there was no right of assignment is as a matter of law wrong.

6 MR. BISCEGLIE: Well, I -- whether it is or isn't in
7 my view is not truly material to this motion because regardless
8 of whether they would have -- they claim that they wouldn't
9 have agreed to a new assignment, I find that hard to believe --

10 THE COURT: I don't care what's hard to -- just
11 answer my question. As a matter of law --

12 MR. BISCEGLIE: They did assign it, Your Honor. They
13 assigned it to ROC Fashions.

14 THE COURT: Let me ask the question and then you can
15 answer it.

16 MR. BISCEGLIE: Sure.

17 THE COURT: As a matter of law, their position is
18 they -- you had, the debtor no right to assign the lease either
19 in bankruptcy or outside bankruptcy without their consent. Do
20 you agree with that proposition?

21 MR. BISCEGLIE: You know, Your Honor, I think -- I
22 can't answer that a simple yes or no. I'd like to but -- if I
23 could but I can't. I think what would have happened is there
24 may have been -- if we had -- the license hadn't been
25 terminated and the Court were made aware that the license

1 weren't terminated it would become part of the estate. There
2 might be an attempt to fund a plan --

3 THE COURT: I don't need an embellishment on a story.
4 All I'm asking as a matter of law a licensor, this licensor
5 takes the position that the license we're dealing with in this
6 case could not be assigned without their consent. Doesn't
7 require any greater factual presentation. Do you agree with
8 that or disagree with that?

9 MR. BISCEGLIE: I don't know, Your Honor.

10 THE COURT: All right. That's fine. That's fine.
11 So, if it couldn't be assigned, do you believe it's assumable,
12 it could still be assumed?

13 MR. BISCEGLIE: So, yes, Your Honor, I feel more
14 strongly that there is --

15 THE COURT: As a matter of law, if the license is not
16 assignable under this circuit it's still potentially assumable.

17 MR. BISCEGLIE: Yes.

18 THE COURT: Okay. You agree that the issue here is
19 not whether it made practical sense to assume it or not but
20 that the debtor was divested of an opportunity to assume it.

21 MR. BISCEGLIE: Correct. That I agree with.

22 THE COURT: And isn't that the sole issue in summary
23 judgment that I'm dealing with?

24 MR. BISCEGLIE: Correct.

25 THE COURT: Their --

1 MR. BISCEGLIE: Sorry.

2 THE COURT: Their view is since it wasn't assignable
3 it had no value and even if it could be assumed it had no
4 value. Now they go into standing on other things but we'll
5 leave that side. Your view is regardless of its value, if it
6 was an asset of the debtor, they could -- it could not be
7 terminated without a court order.

8 MR. BISCEGLIE: Correct, because of the automatic
9 stay. That's right, Your Honor.

10 THE COURT: Now, what about the argument that the
11 debtor's principals -- I think this is the argument as
12 buttressed by their deposition to the lawyers agreed to its
13 termination.

14 MR. BISCEGLIE: There's no basis for that under New
15 York law.

16 THE COURT: Well, as a matter of could they even have
17 done that --

18 MR. BISCEGLIE: No --

19 THE COURT: -- post-petition.

20 MR. BISCEGLIE: Correct. They could not have done
21 that. Absolutely impossible. There's a First Department case,
22 Perez v. Paramount [sic] that Iconix itself cites. It's a
23 First Department case, 1996, and there's also the General
24 Obligations Law 15-301(4) that basically says if an agreement
25 provides that -- for written termination you need to provide

1 written termination, and that's the only way to terminate the
2 agreement. These arguments about repudiation or, you know, a
3 tacit agreement among Signature principals and Iconix to
4 terminate the license, they're just -- they have no basis under
5 New York law.

6 THE COURT: So is it your argument that upon the
7 filing of the involuntary the debtor-in-possession or the
8 trustee -- or trustee really appointed but were to have the
9 same rights as the "hypothetical lien creditor," and therefore,
10 the asset would be subject to that lien and could not be
11 transferred -- could not be disposed of?

12 MR. BISCEGLIE: My short answer to that is I don't
13 know all of the rights of the hypothetical lien creditor but if
14 they had played by the rules I suppose there would have been a
15 process before the Court where Iconix agreed probably to
16 whittle down some of its claims. Signature would have been
17 benefitted in some way perhaps by a reduction in claims against
18 the estate and maybe there would be an auction or some other
19 type of mechanism to maximize the value of the license but that
20 didn't happen because Iconix did not play by the rules. They
21 chose for reasons that the --

22 THE COURT: But the Lauritas who were running the
23 company you allege did it -- conspired to do this.

24 MR. BISCEGLIE: Correct. And --

25 THE COURT: And you step into that company's shoes so

1 why aren't you liable -- why aren't you bound in a court of
2 equity -- I'm not sure what that means anymore but a court of
3 equity that the principal of the entity that you represent you
4 allege conspired with the people you're suing, and you're suing
5 the principal.

6 MR. BISCEGLIE: Because --

7 THE COURT: How aren't you bound by that?

8 MR. BISCEGLIE: Because it's post -- we're suing for
9 post-petition acts.

10 THE COURT: So all the Lauritas acts that you're
11 suing here were post-petition acts. You're not suing them for
12 anything they did pre-petition.

13 MR. BISCEGLIE: Again, what we're suing for is the
14 post-petition transaction and then the subsequent payments that
15 were made to Chris Laurita, \$2.3 million in payments and the
16 payments --

17 THE COURT: All post-petition payments.

18 MR. BISCEGLIE: All post-petition.

19 THE COURT: All right.

20 MR. BISCEGLIE: So -- but clearly -- there were
21 clearly some predicate facts that occurred -- or discussions,
22 things that happened, demand to cure that was made, you know,
23 an e-mail that a general counsel of Iconix --

24 THE COURT: But this all was put in motion three days
25 before the involuntary but -- you guys done?

1 UNIDENTIFIED: Sorry.

2 THE COURT: Okay. If this was all put in motion
3 three days before the filing of the involuntary and finalized
4 so the transaction took place post, would the -- is your
5 argument the same that there's no -- the Lauritas had nothing
6 to -- I'm missing something here. This entire battleship was
7 put in place and it moved forward on just the in pari delicto
8 argument. The fact that it culminated post-petition takes it
9 out of in pari delicto -- it's not Wagoner. It takes it out of
10 in pari delicto?

11 MR. BISCEGLIE: Correct.

12 THE COURT: All right.

13 MR. BISCEGLIE: And again the case I would primarily
14 -- and is Judge Glenn's decision in In Re: Food Management and
15 then the decisions that he cites in there which to my knowledge
16 are the only relevant cases to circumstances like ours that
17 apply in pari delicto and Wagoner, and Iconix's papers really
18 all they do is they cite Wagoner and say you should apply
19 it but for whatever reason they don't touch on In Re: Food
20 Management which has a lot of parallels to this case.

21 THE COURT: All right. So just to sort of summarize
22 this, I'm being asked to decide as a matter of law whether the
23 termination/transfer/whatever else you want to throw in there
24 of this license that was owned or where Signature was the
25 licensee, where that license was terminated and Iconix became

1 the new licensee, that transaction on your part violated the
2 automatic stay, was void, and therefore, leads to a series of
3 damages, right?

4 MR. BISCEGLIE: Yes. And when --

5 THE COURT: And the other side's position is that
6 that license, they had an absolute right to terminate, and
7 therefore, the termination is not void, in violation of 362,
8 and therefore, there can't be any damages. I'm not sure
9 whether the two follow but that's their argument.

10 MR. BISCEGLIE: Yes, except that their argument is
11 wrong as a matter of law on that point. And that they've
12 admitted --

13 THE COURT: You guys are wrong.

14 MR. BISCEGLIE: Well, they've admitted the facts,
15 Your Honor, right, that there was -- New York law is very clear
16 that it requires written notice of termination before a stay
17 comes down. I mean, I believe it's very clear.

18 THE COURT: Then you'll win but they wrote hundreds
19 of pages; assuming they could read the same law, they don't
20 have the same view, and the question about whether or not you
21 can terminate by the actions of the parties or that the license
22 was valueless at the time and therefore could be abandoned in a
23 sense is their argument. And value of it I think is a question
24 of fact, I can tell you right up front. The issue here is not
25 the value. The issue here is whether or not a license, and

1 licenses are the bane of most of our existence in the
2 Bankruptcy Courts but licenses, and this particular license
3 because it does deal with what this license is, whether through
4 circumstances at the time the debtor's petition was filed that
5 license was literally and figuratively terminated in which case
6 it was never property of the estate, in which case everything
7 implodes from it. That's what I have to answer.

8 MR. BISCEGLIE: I believe Your Honor is correct.
9 Both sets of counsel agree there are no disputed facts with
10 regard to termination --

11 THE COURT: No, you don't agree on any facts but
12 you're close.

13 MR. BISCEGLIE: I believe --

14 THE COURT: What you agree on is there was a license,
15 it was terminated and that's about it. That's about it. Now,
16 all the rest of the stuff is not summary judgment issues. Why
17 the Lauritas got money -- if in fact this license was never
18 property of the estate some serious questions about what
19 damages flow.

20 Now, you can argue there were still fiduciary
21 obligations and assumption of assets of the estate and all that
22 but I think the threshold question for me to answer is this
23 license, how it was terminated, and whether it was terminated
24 in violation of the stay, period. The rest of it is subsequent
25 to that which I'm not going to answer today because I don't

1 know the answer but that's what I'm going to decide in the near
2 future that question and then we'll see where everything else
3 flows. Daubert -- everything is a waste of time until I reach
4 the conclusion -- because if it's not -- period. I don't have
5 to restate it. That's how I'm doing this. I don't need any
6 supplemental papers, thank you. You're not encouraged to file
7 any supplemental papers.

8 MR. KOEVARY: May I just say, Your Honor, one thing
9 to mirror my bankruptcy colleague across the aisle on
10 bankruptcy issues. I just wanted to make a clarification.

11 Our view are twofold. One is whatever 303 allows the
12 debtor to do, it does not allow for a violation of the
13 automatic stay. That's one. And number two is that a debtor
14 cannot consent --

15 THE COURT: I don't think they're taking a position
16 that 303 is an absolution from the violation of the automatic
17 stay.

18 MR. KOEVARY: Okay.

19 THE COURT: They're saying it was never a violation
20 of the automatic stay. That's their position.

21 MR. KOEVARY: Fair enough. And then just one more
22 clarification. If it occurred post-petition, our view is that
23 a debtor cannot consent to the violation so Your Honor asked
24 the question over whether or not there was a termination, if
25 the Lauritas agreed to terminate, any violation -- any --

1 THE COURT: Well, I guess part of the question though
2 is if the act of the licensor was predicated on agreements
3 entered into by the debtor pre-petition, did he have a right to
4 rely on them. If the debtor had come to him two days before
5 the filing, it was an involuntary, and said we've got no shot
6 here, we're done, we're at \$7 million, we're walking away. Now
7 there's an involuntary filed. Is it your position that that
8 licensor has no right as a matter of law to rely on anything
9 the debtor did pre-petition?

10 MR. KOEVARY: They can't rely on it if relying on it
11 would mean violating the stay so what they could do is run into
12 court, file a motion to lift the automatic stay.

13 THE COURT: All right.

14 MR. COGAN: One thing -- actually two. First of all,
15 the license specifically required any -- Iconix's consent to
16 any assignment. So that's crystal clear. Aside from the case
17 law that says a universal rule that a trademark requires a
18 licensor's consent.

19 The other thing that I just want to very briefly
20 address is the Food Management Corp. case which they cited for
21 the position that post-petition conduct is not subject to the
22 in pari delicto or Wagoner rule. The Food Management Corp.
23 case involved misrepresentations that were done in the auction
24 process after the entry of an order for relief. I think there
25 is a significant difference -- and there are no cases dealing

1 with pre-entry of order relief because pre-entry of order
2 relief --

3 THE COURT: But the problem is this is in this
4 netherworld of prior to the entry of an order.

5 MR. COGAN: But since the debtor has the right to
6 operate the business as he deems fit during the gap period, the
7 in pari delicto/Wagoner rule has to apply to that conduct as
8 opposed to post --

9 THE COURT: Not if the management of the debtor is
10 divested and is operated through a debtor-in-possession --

11 MR. COGAN: That's not the case here.

12 THE COURT: I understand that.

13 MR. COGAN: And that's why I say I think the Wagoner
14 rule does apply to the knowledge.

15 THE COURT: The clear -- the clarity offered by a
16 post-petition act unfortunately is lost when we're dealing in
17 this gap period. There's lots of stuff that goes on in a gap
18 period that most of us can't figure out which is why we don't
19 like to have long gap periods. The automatic stay does apply
20 but the same way people can negotiate deals in a gap period
21 without court approval, it's a question but it all goes down --
22 funnels down to the simple question, not a simple answer, a
23 simple question was the termination of this license as a matter
24 of law a violation of the stay. My view is if you violate the
25 stay, any act is then void. I found that with court orders of

1 district court judges and have been upheld on it. So I don't
2 have any problem finding it's void if it's a violation of the
3 stay.

4 If it's not a violation of the stay, then it's
5 transferred and it's no longer property of the estate. That's
6 what you guys have teed up. I understand the question.

7 MR. SEIDMAN: Judge, if I might, the way Mr. Pincus
8 and I had divided up the work allocation, he was going to argue
9 our joinder in Iconix's motion and I was going to argue our
10 opposition to the plaintiff's motion. So if the two have
11 melded together, I have three or four brand new points that no
12 one has raised yet, a couple of which are --

13 THE COURT: Sounds like one of those radio talk shows
14 for sports. Let me raise a point that nobody has raised.

15 MR. SEIDMAN: Nobody has raised, Judge. I will not
16 repeat what's been said.

17 THE COURT: You should trade for Calvin Johnson.
18 We'll give up a water bucket and bring in Calvin Johnson.

19 (Court and clerk confer.)

20 THE COURT: Yeah, he will.

21 MR. SEIDMAN: Mitchell Seidman from Seidman & Pincus
22 for Chris Laurita and the New Star Group. And I'll be brief,
23 Your Honor, and I will not repeat things.

24 The first point is that pre-petition the Olshan firm
25 represented the factories. Post-petition they represented the

1 Creditors Committee and Iconix was on the Creditors Committee.
2 I -- this is my first appearance in this case, and when I was
3 preparing for it, it just smacked me in the head how a lawyer
4 was suing their former client --

5 THE COURT: Is any of this relevant to my summary
6 judgment?

7 MR. SEIDMAN: Well, it might be, Your Honor. It's
8 certainly going to be relevant to the trial --

9 THE COURT: Only if the answer is it is do I want to
10 hear it.

11 MR. SEIDMAN: I certainly think it's relevant for the
12 trial and --

13 THE COURT: I'm not interested in the trial.

14 MR. SEIDMAN: Okay.

15 THE COURT: All I'm dealing with is a motion for
16 summary judgment.

17 MR. SEIDMAN: All right. On the summary judgment,
18 Your Honor, on the stay violation issue, I do not believe that
19 an entity can recover damages for a stay violation. I believe
20 the most the entity gets is a contempt hearing and I think that
21 that is relevant for the summary judgment motion. I believe
22 there's case law on it. We've cited --

23 THE COURT: So if there's a violation of the
24 automatic stay and there are damages --

25 MR. SEIDMAN: If there is. If there is.

1 THE COURT: If there's a violation of the automatic
2 stay and there are consequences of that, nobody has to pay it?

3 MR. SEIDMAN: There's different consequences, Your
4 Honor. I believe they get a contempt hearing. I don't believe
5 they get damages.

6 MR. COGAN: If I may, Your Honor, there are ten
7 causes of action; not one of them is for violation of the
8 automatic stay.

9 MR. SEIDMAN: Which is my next point, Your Honor,
10 that this action is essentially an end-run of a proceeding for
11 violating the stay and of a 549 avoidance claim which would be
12 barred by the two-year statute of limitations.

13 This action is essentially an avoidance action or in
14 lieu of an avoidance action or in lieu of a motion for a
15 violation of the stay the avoidance claim would be barred by
16 the statute of limitations and there was never a motion made
17 for a stay violation since this litigation was started. I do
18 think that's relevant to the summary judgment motion.

19 The other thing as a matter of law, Judge, for the
20 summary judgment motion statute of limitations, the tortious
21 interference claim has a three-year statute of limitations and
22 this claim, the tortious interference claim was brought more
23 than three years after the September 15, 2009 termination of
24 the license or transfer of the rights.

25 So I think there's an issue of law there on the

1 three-year statute of limitations on the tortious interference
2 claim and I think there's an issue of law there on the
3 plaintiff end-running an avoidance claim because it's barred by
4 the statute of limitations and end-running a motion for a stay
5 violation that they never brought.

6 THE COURT: Okay. Anybody else? All right. Here's
7 what we're going to do. This trial is scheduled to start next
8 week. Is that right? And you all say it's going to last weeks
9 which means if I start it, I would have to continue it after my
10 life here, and that's one of the things I have to talk to some
11 folks about because there's going to be new judges in here
12 probably January and I get to go home.

13 Now I can also -- since I'm familiar with it start it
14 and keep it. I mean, I'd try it but we've got to figure out
15 and I'll let you know plenty of time -- I'm not going to
16 prepare for a trial that I'm not going to have. So -- but the
17 summary judgment I'll be doing. I'll give you a decision on
18 that.

19 So I'm going to get to Judge Morris and ask Judge
20 Preska because also is involved what they would like me to do
21 and then we'll get to you as quickly as possible.

22 MR. SEIDMAN: Judge, if we're on housekeeping, I have
23 one issue with respect to the trial date. Since we made an
24 earlier application for an adjournment based on the fact that
25 our firm was new, since that time, I've been reached for trial

1 and I am in the middle of a three-week jury trial and the only
2 reason I'm not there today is because it's Election Day and
3 state courts in New Jersey are closed.

4 I've asked for permission from the state court judge
5 to be excused to be here on the 12th and 13th and being aware
6 of the supremacy clause, he has not answered me yet. So -- but
7 we're not supposed to finish --

8 THE COURT: State Supreme in Manhattan?

9 MR. SEIDMAN: No, no. The state court in New Jersey,
10 Your Honor, in Bergen --

11 THE COURT: Oh, then he's not going to --

12 MR. SEIDMAN: But I'm duty bound on behalf of both of
13 my clients to make the request.

14 THE COURT: Okay. In all -- that will not be
15 sufficient. I mean, I respect the fact that -- but somebody in
16 your firm will have to carry the -- for the first couple of
17 days if we go ahead. This has been going on for years and so
18 you all took the case and that's fine with me. I think you're
19 good lawyers but you take it as it stands. So we'll figure it
20 out but again I'm going to get an answer to you guys within the
21 next forty-eight hours, and I'm not sure what my preference is
22 but I want to see what -- again, Judge Morris and others want
23 to happen. If it's turned over to -- if it does go -- if I
24 rule on the summary judgment and then it's picked up by a new
25 judge, that judge can try it and it will start at zero which

1 may be the right answer. It's just unfortunate but that's
2 life.

3 MR. COGAN: To some extent, we're going into a trial
4 without knowing exactly what issues are in the case or might
5 not be in the case. I don't mean to impose --

6 THE COURT: I agree with that.

7 MR. COGAN: -- more work on the Court but doesn't it
8 make sense to have the motion for summary judgment decided
9 before we have the trial?

10 THE COURT: Yes. And if I can't decide it before,
11 then that decision on the trial is easy. The question is
12 whether I can decide this on this issue between now and next
13 week.

14 MR. COGAN: The concern that I think we all have is
15 what are the exhibits, who are the witnesses. You know, we
16 don't know which causes of action -- you know, the whole case
17 may be thrown out hopefully. There might be only two causes of
18 action that remain. I mean, I --

19 THE COURT: Okay.

20 MR. COGAN: I think it's fair --

21 THE COURT: Here's what the right thing to do. We're
22 not going to have the trial. I'll adjourn the trial. I'm
23 going to finish the summary judgment and then you all will pick
24 this up with another judge for trial assuming there is a trial.
25 I think that -- as much as I dislike adjourning things, I'm not

1 going to force -- shoehorn you guys into my schedule. That's
2 just not right. So --

3 MR. COGAN: I mean, I don't mind continuing the trial
4 with Your Honor after the motion for summary judgment is
5 decided so that way we know what the case is about. You know,
6 what the -- and I would stipulate, you know, to Your Honor
7 continuing whether it's after January or --

8 THE COURT: Big of you.

9 MR. COGAN: I know you love this case.

10 THE COURT: This is not an interview where I want
11 something. I'm not trying to get business. This is the Second
12 Circuit deciding they like me too much or don't like me, I'm
13 not sure which answer is right but no, they will permit me to
14 stay here. Again, let me talk to Judge Morris. She's the
15 Chief -- as you know, Chief Judge in the Southern District. I
16 have more than enough, Mr. Klestadt knows on my plate out in
17 the Southern -- wherever I am, CI. So -- but I do understand
18 that we've spent a lot of times. I know the issues, I know the
19 lawyers. I'll get you an answer but the trial -- we're not
20 having it next week so you don't have to prepare for that, and
21 I'm going to get you the summary judgment decision as quickly
22 as possible and then we'll see where we go.

23 All right?

24 MR. COGAN: Thank you, Your Honor.

25 THE COURT: Thank you all.

1 MR. KOEVARY: Thank you, Your Honor.
2 (Concluded at 2:56 p.m.)

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9 **C E R T I F I C A T I O N**

10 I certify that the foregoing is a correct transcript
11 from the electronic sound recording of the proceedings in the
12 above-entitled matter.

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16 Kathleen M. Price

DATE: November 12, 2014

17 Kathleen Price, AAERT Cert. No. 325

18 Certified Court Transcriptionist

19 AD HOC TRANSCRIPTION, LLC
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